United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8315

THE HECHT CO., INC., A CORPORATION, *Appellant*,

v.

WALTER R. HARRISON.

Appeal from the District Court of the United States for the District of Columbia.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8315

THE HECHT COMPANY, INC., A CORPORATION,
Appellant,

v.

WALTER R. HARRISON.

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal by The Hecht Company, Inc., a corporation, defendant below, from a judgment for the plaintiff entered by the District Court of the United States for the District of Columbia, on the verdict of a jury in an action for damages for personal injuries (Appellant's App. 32).

The District Court had jurisdiction under Sec. 306, Tit. 11, D. C. Code (Act of March 3, 1901, 31 Stat. 1200, c. 854, § 64).

This Court has jurisdiction to review the judgment under Sec. 101, Tit. 17, D. C. Code (Act of March 3, 1901, 31 Stat. 1225, c. 854, § 226).

The pleading necessary to show the existence of the jurisdiction is:

1. The Complaint (Appellant's App. 1-2).

STATEMENT OF THE CASE.

On September 13, 1940, the plaintiff Walter R. Harrison, went to The Hecht Company, a store operated by the defendant, to make some purchases. He entered that portion of the establishment known as the Bargain Annex (Appellant's App. 5). After completing his purchases he proceeded toward a counter at the other end of the aisle in the store to have his parking ticket stamped (Appellant's App. 5, 6).

The particular aisle in question ran between two different floor levels, and to overcome the difference in levels a ramp had been constructed covered with linoleum and fastened on the edges by brass strips. The incline was a gradual one (Appellant's App. 17, 18).

In describing this ramp, plaintiff testified that there was a drop downward of about 2½ inches (Appellant's App. 7), but Charles L. Marlow, general superintendent of the defendant, testified that in his opinion the drop was only 1½ inches (Appellant's App. 17).

Plaintiff testified that after he had made about three or four steps, as he raised his left foot to make his next step, his right foot gave way and his ankle cracked; that he almost went down but managed to catch himself to keep from falling (Appellant's App. 6, 7). After the accident, plaintiff informed defendant's salesman that he had twisted his ankle (Apellant's App. 19).

Plaintiff had visited the store frequently. On previous occasions he had his parking tickets stamped at the same place and had walked over this particular portion of the aisle innumerable times before without mishap. He never noticed anything wrong with the aisleway either at previous times or on the occasion in question (Appellant's App. 8, 9). There were a number of other people walking in and about the same place when plaintiff sustained his fall (Appellant's App. 9).

The pathway covered by the linoleum was about four feet wide. Plaintiff had walked a distance of approximately

twenty feet before he fell (Appellant's App. 11). He was walking diagonally or catty-corned across the aisle, but there was nothing to prevent him from walking directly down the aisle (Appellant's App. 12). His foot was parallel with the brass nosing around the linoleum and was practically half on the nosing and half off it, and when he raised his foot up he lost his balance (Appellant's App. 13).

The linoleum on the floor was fastened down and was flat, and the edging around the linoleum was also flat against the floor (Appellant's App. 13). The piece of brass stripping was about one-sixteenth or one-eighth of an inch thick (Appellant's App. 14). The linoleum was about one-eighth of an inch thick (Appellant's App. 18).

Soon after the accident, while the plaintiff was still upon the premises, the linoleum and the brass stripping were examined and found to be in place, tacked down and unbroken. There was plenty of light (Appellant's App. 19, 20).

On a dull day about one hundred persons used the aisle in question, while on a busy day there were perhaps a thousand, but no one had ever fallen at that spot before; nor had any of defendant's employees ever heard of an accident by reason of the situation complained of by the plaintiff (Appellant's App. 21, 30, 31).

Defendant's carpenter foreman, William H. Bozman, testified that after making measurements the linoleum was three-sixteenths of an inch thick, and that the thickness between the top of the brass nosing and the flooring was seven-eighths of an inch (Appellant's App. 22, 23).

Following the accident on September 13, 1940, the condition remained the same for about a period of one year when this portion of the store was changed from a bargain annex to a carpenter shop, and was used partly for the storage of merchandise (Appellant's App. 16, 18). The conditions in and around the premises at the time of the trial were different from those existing at the time the accident occurred (Appellant's App. 24).

The Court was requested by plaintiff to permit the jury to view the premises, which was objected to by defendant

on the grounds that the conditions were changed and that by reason of the worn out linoleum now on the floor and the dirt accumulated from the carpenter shop, the jury would obtain a wrong impression of the situation as it existed two years previously when the accident occurred (Appellant's App. 24). Defendant also objected to any measurements or any demonstration being made at the premises in the presence of the jury, or to the taking of any testimony at said premises (Appellant's App. 24-28).

The Court, however, permitted the jury to inspect the premises, but at first ruled that all they could do was look around and that no testimony could be taken (Appellant's App. 26). However, after arriving at the scene, over objection of the defendant, the Court permitted the taking of testimony and permitted several of the jurors to ask questions of the witness Bozman, and also permitted certain measurements to be made, and further permitted plaintiff to demonstrate, at a place other than the one where he actually sustained his injury, how he was caused to twist his ankle (Appellant's App. 26, 27, 28). A motion to strike out plaintiff's demonstration and testimony at the premises was overruled by the Court (Appellant's App. 28).

At the close of the plaintiff's case, the defendant moved for a directed verdict, which was overruled (Appellant's App. 15). A like motion was made at the close of the entire case and overruled (Appellant's App. 31).

The case was submitted to the jury, which returned a verdict for the plaintiff for $1,750, upon which judgment was entered (Appellant's App. 32, 33).

Thereafter, defendant moved the Court to enter judgment in its favor notwithstanding the verdict, or to grant a new trial, which motions were denied (Appellant's App. 34).

STATEMENT OF POINTS RELIED ON ON APPEAL.

(Appellant's App. 35)

1. The Court erred in denying the motion of the defendant for a directed verdict in its favor.

2. The Court erred in denying the motion of the defendant for judgment notwithstanding the verdict.

3. The Court erred in permitting the jury to view the premises of the defendant.

4. The Court erred in permitting testimony to be taken in the premises of the defendant.

SUMMARY OF THE ARGUMENT.

I and II.

Where there is no evidence of negligence, a verdict should be directed for defendant, but if, without negligence, nevertheless the case is submitted to the jury, the court should enter judgment for the defendant notwithstanding the jury's verdict in favor of the plaintiff.

(a) It is not negligence to maintain a structure with portions of the floor at different levels.

III.

Where two years after the happening of an accident, conditions in and upon the defendant's premises are materially changed, it is error for the trial court to permit the jury to view the premises.

IV.

If the jury are allowed to view the premises, the same should be limited to a mere inspection, and it is error for the court to permit either the taking of testimony or any demonstration as to how the alleged accident occurred.

ARGUMENT.

I and II.

Where there is no evidence of negligence, a verdict should be directed for defendant, but if, without negligence, nevertheless the case is submitted to the jury, the court should enter judgment for the defendant notwithstanding the jury's verdict in favor of the plaintiff.

(a) It is not negligence to maintain a structure with portions of the floor at different levels.

Briefly summarized, this is a case in which the plaintiff, while walking diagonally down an aisle in defendant's store twisted his ankle, sustaining injury. It is undisputed that neither the linoleum nor the brass edging around it was in any manner defective (Appellant's App. 13, 19). It is apparent that the plaintiff's entire right to a recovery was based upon the theory that it was negligence for the defendant to maintain a ramp which abridged two different floor levels in the establishment (Appellant's App. 6, 7, 17, 18). It is well settled, however, that the maintenance of various portions of the floor at different levels does not constitute negligence.

In *Bell* v. *Central National Bank,* 28 App. D. C. 580, this Court quoted with approval from the case of *Ware* v. *Evangelical Baptist Benevolent & Missionary Society,* 181 Mass. 285, 63 N. E. 885, as follows:

> "It is a matter of common observation that in entering and leaving stores, halls, railway-car stations and platforms, office buildings, and other buildings and places and private houses, adjoining surfaces are frequently at different levels, and the difference in level has to be overcome by one or more steps of greater or less height, or by some other device. The same thing happens in the interior of buildings and structures. We cannot think that such a construction is of itself defective or negligent."

So also in *Garrett* v. *W. S. Butterfield Theatres, Inc.,* 261 Mich. 262, 246 N. W. 57, plaintiff, while going through a

ladies' lounge of a theatre, a dimly lighted room, from which there was a step-down of about 4½ inches, fell and was injured. A verdict for the plaintiff was reversed without a new trial, the Court saying:

> "Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it. (Citing cases.)"

To the same effect are the following cases, in which it was held under similar circumstances that, as a matter of law, there was no negligence;

Watkins v. *Piggly-Wiggly Bird Co.,* 31 Fed. (2d) 889.
(Entrance to store with difference in level between the store and sidewalk).

Albachten v. *The Golden Rule,* 135 Minn. 381, 160 N. W. 1012.
(Hallway maintained at a level four inches higher than that of an intersecting hallway).

Hoyt v. *Woodbury,* 200 Mass. 343, 86 N. E. 772.
(Floors at different levels, with risers connecting the two levels).

Dickson v. *The Emporium Mercantile Co., Inc.,* 193 Minn. 629, 259 N. W. 375.
(Difference in level of six and one-half inches in hallway).

Haddon v. *Snellenburg, et al.,* 293 Pa. 333, 143 Atl. 8.
(Six inch difference in level between two portions of floor).

Hogan v. *Metropolitan Building Co.,* 120 Wash. 82, 206 Pac. 959.
(Inclined entrance to a store rising about eleven inches in seven and one-half feet).

Mullen v. *Sensenbrenner Mercantile Co.,* 260 S. W. 982 (Mo.).
(Tile entrance to a store, with a slope of five inches in five feet).

Tyler v. *Woolworth,* 181 Wash. 125, 41 Pac. (2d) 1093. (Fall on ramp).

Kelley v. *Luke,* 140 Neb. 283, 299 N. W. 593. (Difference of floor level between lobby and coffee shop of hotel).

Cleary v. *Meyer Bros.,* 114 N. J. L. 120, 176 Atl. 187. (Fall down eight inch step in women's rest room).

III.

Where two years after the happening of an accident, conditions in and upon the defendant's premises are materially changed, it is error for the trial court to permit the jury to view the premises.

For about a year following the occurrence of this accident, the defendant continued to operate the Bargain Annex as a place for the sale of merchandise (Appellant's App. 16). Thereafter, however, it was converted into a place for the storage of merchandise and a carpenter shop (Appellant's App. 18). The linoleum was permitted to wear out and dirt was allowed to accumulate (Appellant's App. 24). It was no longer accessible to customers of the defendant, and objection was made by the defendant to the Court permitting the jury to view the premises under these circumstances (Appellant's App. 24). It is well settled that in order for testimony to be admissible with respect to experiments and demonstrations made out of the court room, the conditions must be substantially similar.

People v. *Halbert,* 78 Cal. App. 598, 248 Pac. 969.
McLendon v. *State,* 90 Fla. 272, 105 So. 406.
Ohio County Drug Co. v. *Howard,* 201 Ky. 346, 256 S. W. 705.
City of Manchester v. *Beavers,* 38 Ga. App. 337, 144 S. E. 11.
Bretall v. *Missouri Pac. R. Co.,* 239 S. W. 597 (Mo. App.)

So in *Kinney* v. *Folkerts,* 84 Mich. 616, 48 N. W. 283, in an action for damages for personal injuries received from

machinery in a mill, it was held that the court correctly refused to permit a blower to be run in the presence of the jury at the mill where the construction of such blower was not the same as when the plaintiff was injured.

And again in *Mountain Water Co.* v. *Davis,* 195 Ky. 193, 241 S. W. 801, in an action against a water company for its failure to furnish sufficient pressure as required by its contract, which resulted in the destruction of the plaintiff's house by fire, it was held error to have the jury witness a demonstration of the throwing of water from the same hydrant at the same place with the same pressure that the defendant proved it had on the occasion of the fire, since it was manifestly impossible to reproduce the same conditions or performance as on the night of the fire.

In *Meier* v. *Weikel,* 22 Ky. L. Rep. 953, 59 S. W. 496, there was a statutory provision permitting a view of real property which was the subject of litigation or of the place where any material fact occurred. It was held that this statute was limited to a view only, and that permitting the jury to witness the operation of machinery was error since such operation might, by an interested party, be made so different before the jury from what it was at the time of the controversy as to entirely mislead them in regard to the merits of the case.

From the record in the case at bar, it is quite apparent that premises used for the storage of material and for a carpenter shop for more than a year prior to the time the jury were permitted to view them could not possibly present the same conditions and circumstances as existed at the time of plaintiff's accident.

IV.

If the jury are allowed to view the premises, the same should be limited to a mere inspection, and it is error for the court to permit either the taking of testimony or any demonstration as to how the alleged accident occurred.

It is apparent that after the jury were permitted to view the premises the Court changed his mind with respect to the taking of testimony, since before proceeding to the premises the jury were definitely told by the trial judge that no testimony would be taken at the scene (Appellant's App. 25-26). Upon arriving at the scene, however, the following occurred:

> "The Court: I suggest that you get up around so you can all see what they are going to do.
> Mr. Marlow: Where was the counter?
> Mr. Bozman: Sitting right about there (indicating).
> Mr. Simon: Where was the stamping desk?
> Mr. Bozman: Right here (indicating).
> Mr. Simon: Is this a piece here that goes down into the aisle?
> Mr. Bozman: Yes, sir. That goes down to the aisle.
> A Juror: Is this the original strip that has been here all the time?
> Mr. Bozman: Yes. It has been here all the time.
> The Court: Now, if you will have the carpenter get a spirit level and measure this fall for us. I want the drop from there where the ramp began, how much drop it is from it, from that ramp down here.
> * * * * * * * * * *
> (Mr. Bozman proceeded to make the measurement requested.)
> * * * * * * * * * *
> Mr. Bozman: One and three-quarter inches to the floor.
> Mr. Cusick: A little more than one and three-quarters?
> Mr. Bozman: One and three-quarters full.
> Mr. Simon: Mr. Bozman, please measure the space from * * *
> * * * * * * * * * *

the floor to the top of the brass stripping.
Mr. Bobman: That is three-sixteenths. * * *

* * * * * * * * * *

Mr. Harrison: Here is the part where I stepped on the drop, from here to here.
A Juror: Is this the original floor?
Mr. Bozman: Yes.
A Juror: You have never covered over this all the time?
Mr. Bozman: No.
A Juror: In other words, this is just as the floor was at the time he was walking on it?
Mr. Simon: Yes.
A Juror: And he stepped on that and claimed that his foot went here?
Mr. Simon: Yes." (Appellant's App. 26-27.)

In addition, the Court over objection of the defendant, permitted the plaintiff to demonstrate to the jury the manner in which he claimed to have twisted his ankle, and at a different place from where the actual accident occurred (Appellant's App. 27-28). A motion to strike out the demonstration was overruled (Appellant's App. 28).

It is well settled that on a view by a jury they have no right to take evidence, and that the visitation must be limited to a mere inspection of the premises.

26 R. C. L. sec. 14, p. 1018.

In *Moore* v. *Chicago, St. P. & K. C. R. Co.,* 93 Iowa 484, 61 N. W. 992, there was a statute which permitted the jury to view any real property which was the subject of the controversy, or the place in which any material fact occurred. It was held that this statute did not authorize the Court to permit the jury, in an action for damages received at a railroad crossing, to be taken to such crossing and there be placed in a wagon the height of the one used by the person injured, and to witness the backing of an engine and tender across the street, and to observe the running of such engine from different standpoints. The Court said:

> "It was held in the case of Close v. Samm, 27 Iowa 503, that the object of this section of the statute is to enable the jury the better to apply the evidence given on the trial, and not to base their verdict in any degree upon the examination of the premises itself, or to become silent witnesses as to facts in relation to which neither party has an opportunity to cross-examine. The jury were doubtless conducted to the place of the accident under the authority of this statute. But more was done than the statute authorizes. The jury, judge, parties, and their counsel, and others, left the courthouse, —the place appointed for the trial of cases,—and the defendant was permitted to conduct its defense and present its evidence to the jury where there was no opportunity for cross examination, and no means by which the plaintiff could have a review of the case in this court in the event that the case had proceeded to verdict and judgment against him. We know of no authority by which the trial of a case may be removed from the courthouse, and proceed in the streets of a city, or on the line of a railroad by the running of trains, and observations of the jury taken while sitting in a wagon."

And in *Kilgore* v. *State,* 19 Ala. App. 181, 95 So. 906, in a prosecution for larceny of an automobile, the Court, the jury, the defendant, and the attorneys, left the court room, against the objection of the defendant, and proceeded to a street in the rear of the courthouse to view the car which was parked there. At the scene, the testimony of the owner of the vehicle was received with respect to certain identification marks on the car. The defendant moved to exclude all of the evidence taken outside of the court room and on the street, which was refused. In holding that the failure of the Court to withdraw the case from the jury upon defendant's motion and declare a mistrial, was reversible error, the appellate court said:

> "The effect of these rulings of the court was practically to remove the trial of this defendant, or a portion thereof, from the only authorized place where he could be tried (the courthouse, of the county in which

> the offense is alleged to have been committed) to the streets of Clanton. The proper place for the holding of court and trial of criminal cases is the courthouse of the county, and not elsewhere; and in the absence of express legislative authority, it should not be removed to any other place. Hayward v. Knapp (1875) 22 Minn. 5 . . . We are of the opinion that viewing by the jury in a criminal case, in the absence of express statutory authority, is of very doubtful propriety. But, if such 'viewing' is indispensable to the ends of justice, and in furtherance thereof is ordered by the court, it should be a view pure and simple, and no examination of witnesses should be had outside of the court room."

To the same effect see:

Hayward v. *Knapp,* 22 Minn. 5.
Smith v. St. Paul City R. Co., 32 Minn. 1.
Foster v. *State,* 70 Miss. 756, 12 So. 822.
People v. *Thorn,* 156 N. Y. 286, 50 N. E. 947.
Garcia v. *State,* 34 Fla. 311, 16 So. 223.
Hayes v. *Territory of Oklahoma,* 7 Okla. 15, 54 Pac. 300.

To permit the plaintiff to demonstrate how he injured himself two years after the occurrence of the accident and at a place entirely different from that where the injury occurred was clearly error.

Meier v. *Weikel,* 22 Ky. L. Rep. 953, 59 S. W. 496.
Hughes v. *General Electric Light & Power Co.,* 107 Ky. 485, 54 S. W. 723.

CONCLUSION.

In conclusion, it is respectfully submitted that:

I. If this Court be of the opinion that a verdict should have been directed for the defendant, or that judgment for the defendant should have been entered notwithstanding the verdict, the judgment should be reversed and the action remanded to the Court below with directions to enter judgment for the defendant; or

II. If this Court be of the opinion that the Court below erred in either permitting the jury to view the premises or in permitting testimony to be taken and demonstrations and experiments to be made at the premises, the judgment should be reversed and the action remanded for a new trial.

LAWRENCE KOENIGSBERGER,
LEROY S. BENDHEIM,
LEWIS JACOBS,
Attorneys for Appellant.

APPENDIX

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APPENDIX

1 In the District Court of the United States
For the District of Columbia

WALTER R. HARRISON, *Plaintiff*

v.

THE HECHT CO., INC. A Corporation, *Defendant*

Complaint (Damages for Personal Injuries—Defective Premises).

Filed Nov 29 1940

1. The plaintiff, Walter R. Harrison, an adult, resident of the District of Columbia, sues the defendant, The Hecht Co., Inc., a corporation engaged in business in the District of Columbia.

2. That on to-wit September 13th, 1940 and for a long time prior thereto the defendant owned and operated a department store in the City of Washington, District of Columbia, known as "The Hecht Co. Bargain Annex", located on "E" Street between Sixth and Seventh Streets, Northwest, wherein it sold merchandise to the general public, and was in sole control and possession of said store and the appurtenances, and on September 13th, 1940 plaintiff was in the said store as an invitee of the defendant for the purpose of purchasing articles held for sale by it.

3. The defendant negligently and carelessly maintained the aisles of the first floor of the store in a dangerous and unsafe condition in that the wooden floor was worn, irregular and of different levels, and said defects were covered by linoleum making the floor dangerous to walk over.

4. Plaintiff avers that, while he as an invitee was walking over and upon said floor and as a result of the negligence aforesaid, he was thrown and suffered a severe sprain of the right ankle and was otherwise injured, was pre-

2 vented from attending his work, suffered loss of wages, suffered great pain of body and mind, and incurred expenses for medical attention in the sum of Ten Thousand Dollars ($10,000.00).

Wherefore, plaintiff demands judgment against the defendant in the sum of Ten Thousand Dollars ($10,000.00) and costs.

RALPH A. CUSICK
1100 Investment Bldg.
Washington, D. C.
Attorney for Plaintiff

The plaintiff herein requests that the issues in this case be tried by a jury.

RALPH A. CUSICK
Attorney for Plaintiff

* * * * * * * * * *

Answer.

Filed Dec 16 1940

First Defense.

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense.

2. The defendant is without knowledge or information sufficient to form a belief as to the truth of the averment of Paragraph 2 of the complaint that at the time therein set forth the plaintiff was in the store of the defendant for the purpose of purchasing articles held for sale by it.

3. The defendant denies each and every allegation contained in Paragraph 3 of the complaint.

4. The defendant denies that it was in any respect negligent.

Third Defense.

Such injuries as the plaintiff sustained proximately resulted from his own negligence.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,
Attorneys for Defendant.
1426 H Street, N. W.,
Washington, D. C.

4 District Court of the United States for the District of Columbia.

Calendar No. ——.

Civil Action No. 9256.

HARRISON, *Plaintiff,*

v.

HECHT CO., INC., *Defendant.*

Pretrial Proceedings.

Filed Nov 17 1941

Statement of Nature of Case:

Suit for damages for personal injuries allegedly sustained by plaintiff, a customer in store of defendant, as result of fall on allegedly defective floor. Negligence claimed is the creation and maintenance of dangerous condition of floor, plaintiff claiming floor was worn, uneven and of different levels, covered by linoleum. Defendant denies negligence, admits there is a three-inch drop in level of floor within a distance of a foot and a half, but maintains it was not negligent to compensate for difference in level of floor in this manner. Puts plaintiff to proof as to extent of injury claimed.

Injury complained of consisted of severe sprain to ankle. Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent

course of this action shall be governed by the following stipulations, unless modified by the Court to prevent manifest injustice:

Defendant agrees that a letter from railroad company (plaintiff's employer) showing days and amount of wages lost from employment allegedly as a result of this injury, will be admitted without proof, but defendant does not admit that same was result of the injury complained of.

X-rays will be produced at time of trial by plaintiff, and may be admitted without formal proof, if relevant.

Medical expenses will be shown by doctor who will be at trial.

Defendant admits that at time of accident, plaintiff was in the store as a customer thereof.

Plaintiff does not claim faulty construction of floor, but relies upon unevenness of surface thereof.

Dated November 17, 1941.

JAMES M. PROCTOR,
Pretrial Justice.

Attorneys authorized to act:
R. A. CUSICK,
Plaintiff,

SIMON, KOENIGSBERGER & YOUNG,
Defendant.

* * * * * * * * * * *

6 March 6, 1942.

The above-entitled case came on for trial before Mr. Justice Jesse C. Adkins at 10:40 o'clock a.m.

Appearances:
RALPH A. CUSICK, ESQ., *for the plaintiff.*
SIMON, KOENIGSBERGER & YOUNG,
by MORRIS SIMON and LAWRENCE KOENIGSBERGER, ESQS., *for the defendant.*

* * * * * * * * * * *

17 **Walter R. Harrison**

* * * * * * * * * *

Direct Examination.

By Mr. Cusick:

* * * * * * * * * *

Q. Coming down to September 13, 1940, did you have occasion to go to the Hecht Company? A. Yes, I did.

* * * * * * * * * *

18 Mr. Simon: Oh, we admit that he was a customer in the store.

By Mr. Cusick:

Q. You made some purchases. Then what part of the Hecht Company store were you in, sir? A. I was in the E Street store.

Q. Is that known as the bargain annex? A. That is known as the bargain annex.

* * * * * * * * * *

Mr. Cusick: These photographs, your Honor, were taken by them. I am satisfied to use them.

The Court: Very well.

By Mr. Cusick:

Q. After you had completed your purchases, then where did you go? A. After I completed the purchases, I went to the counter to have my——to pay for the parking ticket and have it stamped.

Q. I will show you these photographs. Is that where you were (handing photographs to the witness)? A. This counter here is where I went to pay the parking ticket.

* * * * * * * * * *

19 Q. Is this a correct picture to show where the accident occurred? A. Yes. That shows it. That is it, looking more fuller on this end than it does on the other end.

Mr. Simon: We can admit that the piece of linoleum is the same width for the entire run.

By Mr. Simon:

Q. Is that what you mean? A. No. What I mean is this: This part in here shows larger than it does in through here, than this section in here over to here.

20 It has me puzzled as to this part in here. But here is where the accident really happened. It was near this corner here, right in through here.

This is at the other end of kind of a corridor, like, in the aisle that came around this way to go up to the rear there.

On this side there is an aisle that goes around in back of this part here and you come out back there and get your car.

* * * * * * * * * *

This corner here is where there is a girl that stamps your parking ticket. You pay her for the parking.

I started out this side, and noticed that there were people transacting business in there.

I came on back and made a circle here, right in here, coming on back this way; and when I stepped around in here, I made about, oh, I would say, around about three or four steps, possibly, and happened to hit this place in here with my foot.

Mr. Simon: Can't we mark that place right where he stood?

21 The Witness: Right in here. Right in this section here.

By Mr. Simon:

Q. Where Mr. Cusick has put a pencil mark? A. Along in that section.

My foot hit this place, * * *

Q. From the metal strip to the counter, was that on a level, or was there any incline there? A. This part in here is on a level, but from this light seam that goes down there one or two inches or two inches and a half there, this part

here is higher than what this main floor is, and this condition was put across here to try to bring it down as much as they could without causing any difference in the floor.

But there was a 2½-inch drop in there, and it had been brought out in a drop like that. This was in here. Of course, it is not perfect. But right in here it was brought down, and this wire or brass tacking in here held this down.

When I walked, made my turn here to come out, my foot stepped on this. As I raised my right foot and stepped on this condition in here, as I raised my left foot to make my next step, as I did that, it gave way with me, and I felt it give a little, a little give over in here; and I hap-
22 pened to catch myself, and my ankle cracked just the same as a rifle had gone off; and I continued to hobble along until I got over to the, to here; and just as I got here, the gentleman who had waited on me, made the sale, helped me to a seat. That was Mr. Seff. And I told him that I had hurt my ankle, and he helped me over to a chair and he sat me there and notified the nurse, and the nurse came down and bandaged my ankle, or looked at it. And then the doctor came in.

Q. Was there any warning or any sign there stating that there was a drop there? A. No warning whatsoever.

Q. Did you fall down? A. I almost went down, but it happened that I struggled and managed to swing myself and catch myself to keep from going head first into the table that was sitting there.

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Q. Who came to your assistance? A. Didn't anybody come to my assistance at the time; and I managed to make my way over to the table, hobbled over on one foot, and with as much, as less pressure as I could make on my
23 right foot, until I got to the table.

And then I saw this Mr. Seff, and he said, "What is the matter?" And I says, "I just turned my ankle over this place there on the floor."

So he said he would come over, and he helped me to have a seat, and called the nurse and said, "They will take care of you."

So they called the nurse, and she came down right away and examined me.

She said, "Well, the best thing to do is wrap it up." So she bandaged it up.

It was bandaged when the doctor happened to come in right behind them.

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Cross Examination

By Mr. Simon:

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Q. On this particular day, when you purchased a suit at the Hecht Company, had you been there frequently? A. Oh, Yes. I did quite a good deal of business with the Hecht Company.

Q. With Mr. Siff? A. Seff or Siff.

Q. He was the man that waited on you on most occasions? A. Yes.

Q. You had been in this department on many occasions? A. Yes, sir.

Q. You had occasion to have your parking tickets stamped in this same place that you had it stamped on this particular day, before, had you not? A. Oh, yes. Sometimes in the other building too. They have a parking ticket place on the other side. Of course, I didn't exactly do all my buying on the bargain annex side. I used the other side too sometimes.

Q. You had been to this particular parking desk on innumerable occasions, had you not? A. I had.

Q. You had occasion to walk over this particular part and to walk over this particular place on innumerable occasions, had you not? A. I had walked over it before. Yes, sir.

Q. Did you ever see anything wrong with it when you walked over it before? A. I never looked for anything when I walked over it.

44 Q. Did you find anything wrong with it in your walking over it? A. Well, I never taken any particular notice of anything.

Q. Did you see a break? A. No.

Q. Did you see a number of other people walking in and about the same place that you fell on, on the date of this occurrence? A. Well, I saw—now and then I saw a person who was an employee of the store would possibly walk there to have a package wrapped.

Q. That was a wrapping desk too, was it? A. Wrapping desk too. Yes, sir.

Q. And you saw a lot of people go there and have their parking tickets stamped, didn't you? A. Well, I couldn't say how many I saw. But I imagine that there is other people go there for the same purpose. I never stand and watch the other people transact business. I transact my own and go ahead.

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45 Q. Now, on this particular day, in order to have your parking ticket stamped, you went around to the other side of this particular counter (indicating)? Isn't that right, sir? A. No, sir. I was still on the same side.

Q. Where was the stamping desk? A. Here is the stamping desk (indicating).

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48 Mr. Simon: I think Mr. Harrison was about to show us on the picture as to where the desk was that he took his parking ticket to be stamped.

* * * * * * * * * *

The Witness: Here, up in this corner here, is where the parking ticket was stamped. Right in here there is a girl sitting, right in that corner.

On the other side there is another opening in here that you can park.

I had just transacted my business and come over to get my parking ticket stamped, and I started around this corner

here, when I saw there was some people in there was transacting business.

So I went here somewhere except I think I was on the way back, and I came around and made my turn to come back to go out this doorway, because there was an opening down in here, another aisle here that goes right direct to the door.

* * * * * * * * * *

49 Q. You mean like this picture here? A. Comes right down here to the door to go out the back way. There is a back door back up in here.

Q. The men's furnishing department was down on that end, wasn't it? A. Yes, sir. Men's suits.

Q. Did you go in there to purchase a suit? A. That is what I went there to do, intending to buy a suit. I had received a notice from Mr. Siff that they had some very good suits in there and had them on sale, and if I needed one, to come up and look them over. This Mr. Siff was waiting on me.

Q. You had already bought your suit, hadn't you? When you left the place where your ticket was stamped, did you intend to go over to this department and buy something else on your way out? A. When I finished buying my suit I did go over into the other department and bought—

Q. Men's furnishings? A. If I am not mistaken, I think I bought four ties or two or four ties over there. They was wrapping what I picked out, wrapping it up; and I went over to get my parking ticket stamped.

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55 Q. How wide was the pathway covered by that linoleum? A. It is about, I should say, about 4 or 6 feet.

Q. From 4 to 6 feet? A. About 4 feet, I imagine.

* * * * * * * * * *

Q. You weren't walking on the linoleum portion of it, were you? A. I started over on the linoleum also.

Q. You weren't walking on the linoleum portion of
56 it when you fell, were you? A. No. I was on that—
I was on this metal part that they had dropping.

Q. You were on the brass edge, weren't you? A. That is it.

Q. In other words, you were walking along this brass edging, and your foot was running parallel here, parallel with the brass edging? A. Oh, no. I was not walking along like that,

* * * * * * * * * *

57 Q. * * * From the desk where the parking ticket
was stamped to this corner of the linoleum aisle running to another portion of the store is what distance? A. Well, I would say it is around—I imagine it is as far as from here to the rail.

* * * * * * * * * *

Q. Would you care to estimate that? You are familiar with distances, I assume, as a brakeman. How far is the distance from where you are sitting to this rail where I am standing? A. I would say it is about 30 feet.

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Q. And the distance that you walked from where the parking ticket was stamped to where you fell was a distance of about 30 feet? A. No. It is less than that. It is about 20.

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58 Q. You had got around the corner of that counter,
hadn't you? A. Gone back of this here?

Q. Yes. A. No. I had started back.

* * * * * * * * * *

Q. Had you started around the corner and then come back a distance of about 20 feet before you fell? Is that right? A. That is it.

Q. And this 20 feet that you walked—were you constantly on this linoleum pathway? A. When I cut across

this way, it seemed as though I had walked out this way.

Q. You walked on an angle, you mean? A. I made a turn. Instead of making a right-hand turn, I made a turn around this way. It seemed—well—

59 Q. Get yourself oriented. * * * A. No. Instead of making a right-hand turn, I made a left-hand and came right around this way. Then I saw people were there, and instead of coming back again, I came on around this way and walked on out.

Q. You didn't twist your foot in this turn, did you? A. Oh, no.

* * * * * * * * * *

Q. Now, let us assume that this is the parking ticket desk right here (indicating) where you had your ticket stamped. You came here? A. Yes, sir.

Q. Then you started to go back for this package?

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Q. Then you started on an angle and walked out to the edge of that aisle way; is that right? A. I walked catty-corner.

* * * * * * * * * *

60 Q. Was there anything that prevented you from walking directly right in this aisle way? A. No. Not as I remember.

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Q. Why did you walk across the aisle way which was there in place of walking in the pathway? A. Well, I couldn't tell you. For to get out, so I could get out the way. There possibly might have been somebody standing there. I just made my ordinary turn, just the same as you would walk and make a turn around there. You could turn right here, turn to the left.

Q. Please tell me why you walked on the edge where the brass nosing is. A. I didn't walk on the edge. My foot hit there when I was making my step.

61 Q. Then you hit this edge while you were making a step? A. Yes.

By the Court:

Q. When you say you hit, you mean your foot landed there? A. That is where my foot landed, happened to land, when I was walking. It landed on this edge.

By Mr. Simon:

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62 Q. Your foot was parallel or running in the same line with the brass nosing, wasn't it? A. That is it.

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63 Q. So that your foot was practically half on the nosing and half off the nosing? A. That is the stuff. And when I raised this foot up like this, that is when I lost my balance on this condition of the floor.

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102 Q. * * * This linoleum, rubber linoleum, that was on the floor—was that pasted or flapped down to the floor underneath of it? A. As far as I know, it was fastened down.

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Q. I asked you whether the body of the linoleum was flat on the floor underneath it. A. Oh, it was flat on the floor, as far as I know, underneath of it.

Q. And where the edging was, was it flat against the floor underneath of it at that spot? A. As far as I know, it was.

Q. And I understood you to say that there was about an inch and a half drop from the top of this brass stripping to the floor here. A. There was a difference in the edging from here down.

Q. Excuse me, sir. I understood you to say on
103 your direct examination that there was a drop of an inch and a half from the top of the brass stripping to the wooden floor on the edge. A. I am talking about on this side.

Q. That is right. A. This side of the stripping.

Q. That is right. An inch and a half drop?

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105 Q. Tell us—this is an inch and a half? That was the distance from what to what? A. That was the distance from here down to where this turn starts, where this part in here goes down to the lower—the top of the floor comes down to the lower floor.

Q. You mean there was that much of a drop, about the width of your shoe, that there was the difference of an inch and a half in the level? A. That is right. That is what I mean—that much.

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Q. From an inch—you would like to correct it to an inch? A. I would say an inch. Yes.

Q. From an inch to an inch and a half? That is about from there to there; is that right? A. That is right. From the top, from up in here, where the drop starts, from
106 the top of your linoleum down to the other floor, is that much. If you measure up across just about level, it would measure up from this part of the floor.

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109 Q. Please tell me how thick this piece of brass stripping was. A. I will say it is an inch stripping.

Q. It is an inch wide. How thick is it? Isn't it just a thin piece of sheet brass? A. I would say it is around about, might be one-sixteenth of an inch.

Q. One-sixteenth of an inch? A. Or an eighth of an inch.

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111 Q. (Drawing on board) Your theory is that this stripping is on a slant? Is that it? A. That is the idea.

Q. Then please tell us what you mean when you say that the width of the slant is an inch wide. Is that what
112 you mean? A. It is more than an inch wide.

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117 (Witness excused.)

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118 Mr. Simon: If your Honor please, the defendant moves your Honor to direct a verdict in favor of the defendant in this case on the ground that there is no showing of negligence and on the further ground that if there was negligence there was contributory negligence of the plaintiff.

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133 The Court: I have examined some that you gave me and some that my boy gave me. I think on the whole I will overrule the motion at the present time.

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134 **Charles L. Marlow.**

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Direct examination.

By Mr. Simon:

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Q. Your position with the Hecht Company at the time this accident occurred was what? A. General superintendent.

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Q. Do you know the place where this accident occurred? A. Oh, yes. Yes.

Q. What do you call that? The wrapping desk? A. Service desk.

135 Q. It was on what floor? A. The first floor of the bargain annex, what was known as the bargain annex then.

Q. Is that place or was that place at about the time this accident occurred used frequently by the public? A. Oh, daily.

Q. Could you estimate how many people as a minimum would cross about that space? A. Well, that would be hard to estimate; but I would say a great many. It was the

service desk, and it was necessary for customers to go there and have their parking tickets stamped and get their packages and sometimes call for their garments after they had been altered if they preferred to take them with them rather than have them sent. In fact, all the services of the floor were transacted at that desk.

Q. When there is an accident at the Hecht Company, whom does it clear through? A. It clears through my office. I personally read all of them. My secretary gets a report of it, and I read the reports and sign them and so forth and go into it.

Q. Have you ever had an accident to your knowledge of your records that was reported by reason of anyone falling on that linoleum and the strip or anywhere in the vicinity of that service desk? A. We have not.

136 Q. Do you know how long that particular service desk was in use prior to September, 1940, at this particular spot? A. Well, I would say, over a year. Probably longer. But I mean, I would just say, over a year there.

Q. Do you know when you changed it, Mr. Marlow, the exact date? A. No. I do not.

Q. How long after the accident was it that it was changed, if you know, in months or weeks? A. You mean

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Q. The accident occurred on September 13, 1940. A. I would say—how long was the change from the bargain annex into the shop?

Q. Yes. A. Oh, I would say, pretty close to a year.

Q. Subsequent to the accident? A. Oh, yes. Yes.

Q. Was the rubberized linoleum, the desk, and so forth in that condition for approximately a year after the accident occurred? The accident was 1940. A. Yes. Oh, yes. Sure. There were to the best of my recollection no changes of any kind made in it.

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137 *Cross examination.*

By Mr. Cusick:

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138 Q. The bargain annex consisted of two buildings there, didn't it, where this platform connected one part of one building to the other building? A. As far back as I remember it was all one building.

Q. All one building? A. Yes.

Q. There is a difference of floor level, however? A. Yes. That is right.

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Q. My question was, was this platform built there after it was used as a bargain annex or before? A. It is really not a platform. It is a ramp in the different levels
139 of the floor, one floor level being a little higher than another, and those ramps had been built, I think, probably to make walking easier for the customers.

Q. Was that constructed when the building was started to be used for a bargain annex, or was that there previously? A. I really couldn't answer that question.

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Q. Is it your testimony, sir, that the difference in grade in here (indicating) in the floors, is only an inch and
140 a half? A. I would say at that particular point approximately that. I am not an expert on that.

Now, bear in mind, I am not testifying as an expert on distance. I am saying approximately. I didn't measure it.

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Q. Now, you can see it in this photograph, that it is approximately 6 or 7 inches from this strip— A. When I said "an inch and a half" bear in mind that I don't mean on the edge. I mean from where the ramp starts in back—

Q. From the floor up to here? A. Yes.

Q. In other words, if you drew a line like this, that distance there would be an inch and a half from here
141 down to here? Is that right? A. Not over that.

Q. An incline of about 6 or 7 inches up here to this here, and there it is beveled down; is that right? A. That is right.

Q. A rather sharp incline, as shown in the photograph? A. I wouldn't call it sharp, though. I would call it gradual.

Q. You would call it gradual? A. Yes, sir.

Q. That comes down to the top of the strip. Then what is the distance between the top of the strip and the level of the floor? A. I would say the linoleum is generally about an eighth of an inch. The brass nosing, which would be on the edge of the linoleum, oh, I don't think would be over a sixteenth.

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Q. How thick is the linoleum? A. I would say, an eighth.

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144 Q. Your company still has the building there? A. Oh, yes.

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Q. What are you using it for now? * * * A. We are using it for the storage of merchandise; and one end of it some distance away from that is a carpenter shop. The rear end in the rear of that is a carpenter shop.

145 When I say "the rear" I mean towards the alley.

Q. Isn't all this being used as a carpenter shop (indicating)? A. Supplies. Storage.

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Q. How many years was it used as a bargain annex? A. Well, I will say, at least ten.

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147 **Herman Siff.**

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Direct examination.

By Mr. Simon:

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Q. By whom are you employed? A. Hecht Company.

Q. How long have you been in the employ of the Hecht Company? A. Ten years.

Q. Do you know the plaintiff in this case? A. I do.

Q. What were your duties in September of 1940 with the Hecht Company? A. Clothing salesman.

Q. Do you recall Mr. Harrison coming into the store and making a purchase from you on that date? A. I do. Yes, sir.

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148 Q. After you sold Mr. Harrison a suit of clothes, when did you next see him? A. I saw him next when he came back to me and he told me he twisted his ankle.
149 I gave him——

Q. Did you go to where he had twisted his ankle? A. No, I did not. I was busy at that time.

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Q. Do you know where he fell? A. I do not. No, sir.

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150 Q. Did there come a time on that day that you went over and looked at this linoleum? A. Yes. I looked at the linoleum after I got through with my
151 customers.

Q. Was Mr. Harrison still there? A. He was still sitting there. Yes, sir.

Q. Did he go back with you to where— A. I don't recollect, sir.

Q. Did you find anything wrong with any portion of the linoleum? A. No, sir. Nothing wrong there.

Q. Did you examine particularly the brass strip? A. I examined the linoleum and the stripping.

Q. And the metal strip—what have you to say as to whether or not it was tacked down to the floor? A. Yes. It was.

Q. Was it loose in any place? A. No.

Q. What have you to say as to the lighting? A. Plenty of light there at the desk.

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Cross examination.

By Mr. Cusick:

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153 Q. * * * let me show you the photograph.

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154 Q. Here is the floor in the main store; is that correct? A. That is correct.

Q. This is higher up here than the floor is; is that right? A. Yes. Very slight—it is a very slight drop right here, but it is absolutely level.

155 Q. Absolutely level? Will you take a look at the photograph here where the stripping is and some distance back here where this mark is? Just look at that. A. It is about, an incline there of about an inch and a half; something like that; slopes down.

Q. An inch and a half from here down? A. From here down, yes. It is level right here.

Q. There is a bevel here. Isn't that a drop there? A. There is a slight drop there.

Q. What is the distance to that? A. I would say, about an inch and a half.

Q. It is an inch and a half from the bevel here down to the floor? A. That is right.

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Q. What is the level from the top of the lower bevel near the stripping to the base of the stand there? A. That I would say—I wouldn't know. But there is—it is level up to here, and a very slight beveling off, you know, from here down. But it is perfectly level up here, the same as the floor.

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156 *Direct examination*—Continued.

By Mr. Simon:

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157 Q. And how long were you in the vicinity of this particular space here where Mr. Harrison twisted his ankle? A. Ever since the desk has been there.

Q. A couple of years? A. A couple of years. * * *

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Q. How many people a day would you say use that place on an average? A. I would say on a dull day about a hundred.

Q. On a busy day? A. On a busy day maybe about a thousand.

Q. Did you ever see anyone fall at that spot before? A. No, sir.

Q. Did you ever hear of an accident by reason of that situation? A. Not at that spot. No, sir.

158 Q. Now, after this man fell, did you ever hear of anyone falling there? A. No.

Q. Did you ever hear of anyone twisting their ankle there? A. No, sir.

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Cross Examination (Cont'd)

By Mr. Cusick:

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160 Q. What was the space that is identified there, where it says "Parking Tickets"? What was that used for? A. I imagine, for people to go and have their tickets stamped.

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164 **William H. Bozman.**

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Direct Examination

By Mr. Simon:

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165 Q. You are employed by the Hecht Company? A. Yes, sir.

Q. How long have you been employed by the Hecht Company? A. About sixteen years.

Q. Your position with the Hecht Company is what? A. Carpenter foreman.

Q. And how long have you had that position? A. About twelve years.

Q. We are directing your attention to an accident which occurred when a gentleman twisted his ankle in walking across a floor in the bargain annex, which at that time was used, or do you know what it was used for, that particular space?

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A. It was used for selling material.

Q. Do you recall this particular space? A. Yes.

Q. Do you recall the linoleum and this brass strip? A. Rubber. Yes. I do.

Q. Did you at my request measure the linoleum as to its thickness? A. I did, sir.

166 Q. How thick was it, Mr. Bozman? A. The linoleum, the rubber, is a quarter of an inch thick, about three-sixteenths.

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Q. What is this, Mr. Bozman (indicating)? A. That is a brass nosing strip that went over and that held the edge of it down, that you see in the picture at the edge of it here. You see, it is tacked down all the way around the edge with escutcheons through here.

167 Q. Did you measure the thickness between the top of this brass nosing and the flooring here? A. Yes, sir.

Q. What was that space? A. That was seven-eighths of an inch thick.

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A. * * * That is from the top level of one floor to the other. That is three-sixteenths-inch linoleum.

* * * * * * * * * *

Q. * * * Do you know the width of the linoleum?

* * * * * * * * * *

A. Well, I couldn't tell you exactly what the width of the linoleum is there in the picture, but I could tell you the width of the linoleum from the slope where we went there when we were there.

Q. How far back from this brass nosing toward
168 this did it go on a slant? A. 22 inches.

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Q. Did you put a level on this top portion? A. On the top portion of the strip.

Q. What was the top portion? A. Seven-eighths of an inch.

Q. Was the top portion level? A. Yes. It was a flat floor. It was laid there under, just the same as if you would lay a floor down here. Then it was beveled off for 22 inches to nothing, from seven-eighths of an inch to nothing in 22 inches.

Q. From seven-eights of an inch here to nothing? A. To three-sixteenths. Of course, the floor was nothing. When we put this rubber over the floor here, that made three-sixteenths of an inch at the edge of it where you step to go along on the ramp.

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175 (The following proceedings were had at the bench, out of hearing of the jury:)

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The Court: Do you still want a view?

Mr. Cusick: Yes. I think it would be helpful.

The Court: I think it would. I don't see but what this is a good time to go over there now.

Does this man have a level so he can do this demonstration?

Mr. Simon: Yes.

The Court: I think we can understand it better if we see it. You tell me that there is still some of it over there.

So let us get our wraps on and walk over and see it.

176 Mr. Simon: * * * I would like to take an objection to an examination by the jury on the ground that the place is not the same as it was; that they may get a wrong impression from the dirt and so forth from the carpenter shop, and the fact that this linoleum is completely worn out, the accident having happened over two years ago, practically two years ago.

The Court: That was the impression that I had overnight. But now, when you brought some of it here and try to reproduce it before us, I think it is just as likely that they will understand or much more likely if they see it.

I find myself that when I go and look at a place we do have that danger of collateral issues. But I think it is a lesser danger than the other.

Now, let me ask you: When we go there, shall we just observe it without any testimony, or would you like to have him place the linoleum as he did over there?

Mr. Simon: I certainly do not think he ought to be permitted to do that. I don't think so.

The Court: Or make measurements in our presence?

Mr. Simon: I don't think so. I don't think they have a right to have him do that.

The Court: We might see him measure that, if we can.

Mr. Simon: We don't know yet where this accident was.

177 The Court: He says that there is some linoleum there.

Mr. Simon: We don't know yet where this accident was.

The Court: You are not willing to let him take his level and measure this in our presence?

Mr. Simon: I don't think any demonstration should be made.

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The Court: I don't see any objection to him taking a level and determining what the floor is from here to here. You all did say it was 3 inches at the beginning. Now what do you say it is?

Mr. Simon: Seven-eighths.

Mr. Cusick: Twice seven-eighths.

The Court: That would be an inch and three-quarters.

Mr. Simon: Correct.

The Court: What do you want to do?

Mr. Cusick: I think if the jury goes there, I think there should be a measurement. But if they can see it with their own eyes, they can see very well. So I won't insist on it.

The Court: You are satisfied, then, just to all go over and take a look at it?

178 Mr. Cusick: I would like to have the measurement.

The Court: You would like him to measure it as it was at that time?

Mr. Cusick: Yes, sir.

The Court: If counsel object to that, let me have a level and a rule and I will undertake to do it myself.

You are taking an exception?

Mr. Simon: Yes.

The Court: Shall the jurors be permitted to ask any questions?

Mr. Simon: I don't think they are entitled to that.

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The Court: I am going to take a level and show it to them.

(Whereupon proceedings at the bench were concluded.)

The Court: I will say to the members of the jury that counsel and I and the plaintiff saw this on Friday noon,

and since that time—I think you might take this back, gentlemen, with us and show just where it was—since that time counsel have taken a portion of it up to let us see it here. I think you can understand it better if you see it there.

But we won't take any testimony over there. At my request counsel are going to have the carpenter take his level and measure in our presence just what the height is
179 from the highest point down to where this linoleum meets the floor. You can look as much as you want to, but we concluded that we had better not take any other testimony at the time.

* * * * * * * * * *

(Whereupon the Court, counsel, the parties, and the jury proceeded to the scene of the accident, where the following proceedings occurred:)

The Court: I suggest that you get up around so you can all see what they are going to do.

Mr. Marlow: Where was the counter?

Mr. Bozman: Sitting right about there (indicating).

Mr. Simon: Where was the stamping desk?

Mr. Bozman: Right here (indicating).

Mr. Simon: Is this a piece here that goes down into the aisle?

Mr. Bozman: Yes, sir. That goes down to the aisle.

A Juror: Is this the original strip that has been here all the time?

Mr. Bozman: Yes. It has been here all the time.

The Court: Now, if you will have the carpenter get a spirit level and measure this fall for us. I want the drop from there where the ramp began, how much
180 drop it is from it, from that ramp down here.

* * * * * * * * * *

(Mr. Bozman proceeded to make the measurement requested.)

* * * * * * * * * *

Mr. Bozman: One and three-quarter inches to the floor.

Mr. Cusick: A little more than one and three-quarters?

Mr. Bozman: One and three-quarters full.

Mr. Simon: Mr. Bozman, please measure the space from

* * * * * * * * * *

the floor to the top of the brass stripping.

Mr. Bozman: That is three-sixteenths. * * *

* * * * * * * * * *

Mr. Harrison: Here is the part where I stepped on the drop, from here to here.

A Juror: Is this the original floor?

Mr. Bozman: Yes.

181 A Juror: You have never covered over this all the time?

Mr. Bozman: No.

A Juror: In other words, this is just as the floor was at the time he was walking on it?

Mr. Simon: Yes.

A Juror: And he stepped on that and claimed that his foot went here?

Mr. Simon: Yes.

* * * * * * * * * *

182 The Court: Mr. Simon, I don't see any objection to letting him illustrate to the jury. He doesn't have to change his testimony. Would there be any objection to letting him stand as he was when he says that he hurt his foot?

Mr. Simon: If your Honor so rules, I take an exception.

The Court: Put yourself in the position where you were. I understand you don't claim that that is the particular step.

The Plaintiff: No.

(The plaintiff stood as requested by the Court.)

The Plaintiff: You can understand just how it happened. There is this condition here. You raise your foot

up, and that will give. There is nothing there to catch it. Down in that condition. You raise your foot up. This one went down because there is nothing to catch it. It just goes over in that position.

Mr. Simon: I move that that go out.

The Court: I overrule the motion.

The jurors will observe what he says happened. He simply illustrated to you the point where he says, where the plaintiff says, he was there; not with reference to the length, but——That is, don't understand him to say that the fall occurred at this particular spot where he
183 stood, but that is illustrative of what the plaintiff says happened.

* * * * * * * * * *

184 (Whereupon proceedings at the scene of the accident were concluded, and all parties returned to the courtroom, where the following occurred:)

William H. Bozman

resumed the stand and testified further as follows:

* * * * * * * * * *

Redirect examination.

By Mr. Simon:

* * * * * * * * * *

Q. Did you measure the width of this linoleum strip? A. 3 foot 10 inches.

Q. Now, since that place has been used for a carpenter shop—How long has it been used for a carpenter shop?

* * * * * * * * * *

185 Or for its present purposes? A. About four months.

Q. What have you to say as to how it is used? What goes through there? A. Well, lumber is pulled in and out of it, and wrapping facilities, such as trucks loaded with papers and the like of that.

Q. Would that go over where this linoleum was laid? A. Oh, yes. Go right in that, through that elevator now. A lot of it goes in that door and on upstairs.

* * * * * * * * * *

Recross examination.

By Mr. Cusick:

Q. What do you mean by "trucks"? A. That is floor trucks that you push around the store through the departments.

Q. Do you push them around in the departments? A. Oh, yes.

* * * * * * * * * *

Nathan Wolin

* * * * * * * * * *

186 *Direct examination*

By Mr. Simon:

* * * * * * * * * *

Q. You are employed by the Hecht Company. A. Yes.

Q. Were you so employed on September 13, 1940? A. Yes, sir.

* * * * * * * * * *

Q. Who was in charge of that floor at the time
187 that this gentleman twisted his foot? A. I was.

* * * * * * * * * *

Q. Did you have some conversation with him that day? A. Yes, sir. I did.

Q. Please tell us what you said to him, and what he said to you. A. He told me that he tripped on the floor.

* * * * * * * * * *

Q. Did he tell you what he tripped on? A. On the congoleum right near the desk.

* * * * * * * * * *

188 Q. Did he tell you what part of the linoleum he tripped on? A. It was right here some place. He didn't point to the exact spot, but just right in here.

Q. Did he tell you anything about the brass strip? A. No, sir. He did not.

* * * * * * * * * *

Vincent E. Covins.

191 *Direct examination*

By Mr. Simon:

Q. Mr. Covins, you are employed by the Hecht Company?

* * * * * * * * * *

A. I have been employed by the Hecht Company for nine years.

Q. Were you on duty in September of 1940? A. Yes.

* * * * * * * * * *

193 Q. Are you familiar with this particular place where this accident is alleged to have occurred? A. Yes.

Q. What have you to say as to whether or not it is frequented by customers? A. Indeed it is frequented. It is the point where most of the traffic through the building would pass, inasmuch as it was the desk where people came to get their parking tickets stamped and where they called for packages, and where in the normal course of business, if a salesman would sell anything to a customer, the
194 salesman would be required to go to that desk and have the package wrapped. In nine cases out of ten the customer would follow the salesman to that desk and get their package.

Q. Could you estimate how many people would walk around that vicinity on that linoleum in a normal day's business? A. In a normal day's business there would be hundreds of people. I mean, anywhere from three to five hundred people a day, I would say.

Q. Did you ever see anyone trip, slip, or fall at that particular place? A. No. I did not.

Q. Did you ever hear of any of them? A. No.

* * * * * * * * * *

195 **Ernest Violett**

was called as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct examination

By Mr. Simon:

* * * * * * * * * *

196 Q. How long have you been employed by the Hecht Company. A. Five years last October.

* * * * * * * * * *

Q. What is your position with the Hecht Company? A. Floor manager.

* * * * * * * * * *

200 Q. During the period that you have been with the store was this particular place used frequently by customers? A. At the time it was occupied it was used by a good many people who used the parking lot, making their purchases in the store, coming and getting their parking tickets stamped, as well as by the customers in the annex.

Q. To the best of your knowledge how many used that same floor in any particular day? A. Depending upon the day's business. On busy days hundreds of people used it.

Q. Did you ever hear of anyone falling or tripping or slipping or being in any manner hurt by that part of the floor here? A. Not before or since.

* * * * * * * * * *

Mr. Simon: If your Honor please, that is the de-
203 fendant's case.

The Court: Any rebuttal?

Mr. Cusick: That is all, your Honor.

* * * * * * * * * *

204 Mr. Simon: We would like to renew our motion for a directed verdict on the same grounds as originally stated, that there is no evidence showing negligence.

The Court: I will overrule the motion.

222 The Clerk: Does the jury have the verdict?

The Foreman: Yes.

The Clerk: I will take it.

* * * * * * * * * *

223 The Clerk: Members of the jury, rise, please. From the verdict I see that the foreman says that you find in favor of the plaintiff against the Hecht Company in the amount of $1750. That is your verdict, so say you each and all?

The Jury: It is.

The Clerk: The verdict reads:

"1. Was the defendant guilty of negligence? Yes.

"2. If you answer to question 1 is 'Yes,' did such negligence cause the accident to the plaintiff? Yes.

"3. Was the plaintiff guilty of contributory negligence? No.

* * * * * * * * * *

226 **Verdict and Judgment.**

Filed Mar 10 1942

This cause having come on for hearing on the 6th day of March, 1942, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * * * * * * *

who, after having been duly sworn to well and truly try the issues between Walter R. Harrison, plaintiff and The Hecht Company, Inc., a Corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 10th day of March, 1942, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of One Thousand Seven Hundred & Fifty Dollars.

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of One Thousand Seven Hundred & Fifty Dollars ($1750.00) together with costs.

CHARLES E. STEWART,
Clerk,

By HOUSTON S. PARK, JR.,
Deputy Clerk.

By direction of
JUSTICE JESSE C. ADKINS.

* * * * * * * * * *

227 **Memorandum on Motions for Judgment Notwithstanding Verdict or for New Trial.**

Filed May 14 1942

The question in the case is whether the jury could reasonably find from the evidence that defendant failed to exercise reasonable care to keep the floor in a reasonably safe condition.

A portion of the floor was covered by linoleum and at the point where the linoleum terminated it was fastened to the floor by a narrow, thin brass edging. There was a change in floor level somewhere near the center of the linoleum and this change was taken care of by a ramp which was about two feet in width from the highest to the lowest point.

At the point where the edge of the linoleum meets the uncoverd floor the linolum itself is not flush with the floor but a very slight distance above it. From a distance of about 5 inches from the edge of the linoleum to the uncovered floor the ramp falls ½ inch.

The distance between the top of the edge and the uncovered floor ranges from about ⅛ to 3/16 of an inch.

The brass edging is not level but slants slightly toward the uncovered floor.

Plaintiff testified that he was walking diagonally
228 across the linoleum and that the outer edge of the nosing ran from about the center of the ball of his right foot toward the left edge of his heel; that both feet were on the ramp and that neither foot was level and that his right foot as it went off the edging fell a slight distance before touching the floor and that this caused his ankle to turn.

I visited the store three times, the first time with counsel, the second time with counsel and the jury. The third visit was made with consent of counsel but in their absence and after argument of the motions herein. The measurements herein given were made at the last visit.

In my judgment the question is one of fact for the jury and I think their conclusion is a reasonable one upon the facts.

Therefore both motions are denied.

May 14 1942

JESSE C. ADKINS,
Justice.

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230 **Notice of Appeal.**

Filed June 10 1942

Notice is hereby given this 10th day of June, 1942, that The Hecht Company, a Corporation, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 10th day of March, 1942, in favor of Walter R. Harrison against said The Hecht Company; motion for judgment notwithstanding verdict or for new trial overruled May 14, 1942.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,
Attorneys for Defendant.

* * * * * * * * * *

231 **Statement of Points Upon Which Appellant Intends to Rely on Appeal.**

Filed Jul 2 1942

1. The Court erred in denying the motion of the defendant for a directed verdict in its favor.

2. The Court erred in denying the motion of the defendant for judgment notwithstanding the verdict.

3. The Court erred in permitting the jury to view the premises of the defendant.

4. The Court erred in permitting testimony to be taken in the premises of the defendant.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,
Attorneys for Defendant.

* * * * * * * * * *

BRIEF AND APPENDIX FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8315

THE HECHT CO., INC., A Corporation, *Appellant*,

v.

WALTER R. HARRISON, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

RALPH A. CUSICK,
1100 Investment Building,
Washington, D. C.,
Attorney for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX TO BRIEF.

CASES CITED.

IN THE

United States Court of Appeals

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No. 8315.

THE HECHT CO., INC., A Corporation, *Appellant,*

v.

WALTER R. HARRISON, *Appellee.*

BRIEF AND APPENDIX FOR APPELLEE.

Appeal from the District Court of the United States for the District of Columbia.

COUNTER STATEMENT OF CASE.

On September 13, 1940, the plaintiff was a customer in the Hecht Company Bargain Annex located on "E" Street between Sixth and Seventh Streets, Northwest, a store owned and operated by the defendant. After making purchases, he went to the counter provided for the customers to have their parking tickets stamped (Appellant's App. 5).

The counter was connected with aisles. The evidence showed that where the injury occurred, there was a portion of the floor covered by linoleum and where the linoleum terminated with the floor, there was brass stripping. There was a change in floor level near the center of the linoleum and this change was attempted to be cared for by a ramp which was about two feet from the highest to the lowest point. At the point where the edge of the linoleum meets the uncovered floor, the linoleum is not flush with the floor. From a distance of about 5 inches from the edge of the linoleum to the uncovered floor, there is a fall in the ramp. The brass trim or stripping is not level but slants toward the uncovered floor (Appellant's App. 33, 34).

The plaintiff testified that due to the change of levels and angles that both feet were on the ramp and that neither foot was level and that one ankle was turned, and when the other foot was put down on a different unlevel surface, he was thrown and his ankle was severely injured. (Appellant's App. 6, 7, 27, 28).

At the conclusion of plaintiff's case, the judge, with the consent of counsel, examined the premises and overruled the motion of defendant for a directed verdict (Appellant's App. 15).

Defendant called several witnesses on its behalf, none of whom saw the accident but all knew that the plaintiff had been injured in the store (Appellee's App. 6, 7).

Defendant's carpenter foreman, William H. Bozman, testified concerning the condition and the manner of its construction (Appellee's App. 1, 2, 3).

The Court was requested by counsel for plaintiff to permit the jury to view the premises and while the motion was under advisement, the witness, Bozman, removed part of the wood, linoleum and brass stripping and brought the same into Court and attempted to construct the same, and the Court felt that it was to the interest of justice that the jury should view the place where the accident happened. The witness, Bozman, testified that the condition at the

time of the examination by the jury was the same as when the accident happened (Appellant's App. 26, 27).

At the same scene of the accident, counsel for the defendant asked and answered questions and it was then that the Court permitted the plaintiff to show how the accident happened so that the jury would not be confused but would have first hand information and be in a better position to render a true verdict (Appellee's App. 5, 6) (Appellant's App. 27).

Conflicting testimony was put into the case as to measurements and also as to the condition existing (Appellant's App. 6, 7, 17, 18).

The defendant moved for a directed verdict which was overruled by the Court because the case involved a question of fact for the jury to determine (Appellant's App. 15, 31). The case was submitted to the jury, which returned a verdict for the plaintiff, based on the damages sustained by the plaintiff (Appellant's App. 32, 33).

Thereafter, defendant moved the Court to enter judgment in its favor notwithstanding the verdict or to grant a new trial, which motions were denied by the Court and a law opinion filed by the presiding judge shows that the motions were carefully considered and the ruling of the Court is correct in law (Appellant's Appendix 34).

SUMMARY OF ARGUMENT.

I.

The trial court properly overruled the motion for a directed verdict and the motion of the defendant for judgment notwithstanding the verdict.

II.

The court did not err in permitting the jury to view the premises and in taking testimony as to occurrence of happening.

ARGUMENT.

I.

The trial court properly overruled the Motion for a Directed Verdict and the Motion of the defendant for judgment notwithstanding the verdict.

Under the evidence in this case, the court properly submitted the issues to the jury as the question involved was one of fact. The plaintiff testified that he entered the store of the plaintiff, made purchases and was in the portion used and designated for customers to transact business and that he was injured due to a condition existing in the aisle (Appellant's App. 5). The evidence showed that there where the accident happened, a pine floor was placed over an old oak floor then covered with linoleum (Appellees' App. 2). There was a change in floor level near the center of the linoleum and this change was taken care of by a ramp which was about two feet in width from the highest to the lowest point. At the point where the edge of the linoleum meets the uncovered floor, the linoleum is not flush with the floor. From a distance of about 5 inches from the edge of the linoleum to the uncovered floor, the ramp falls one-half inch. The distance between top of the edge and the uncovered floor ranges from about one-eighth to three-sixteenth of an inch. The brass edging or stripping at the end of the linoleum is not level but slants toward the uncovered floor (Appellant's App. 33). The plaintiff testified that after going to the stamping desk and while walking to the merchandise counter, due to the condition testified to and existing and because of the difference of levels and angles, the plaintiff was thrown off balance, causing injury to the ankle (Appellant's App. 6, 7, 27).

At the conclusion of plaintiff's case, the Court, with the consent of counsel, made an inspection of the scene and overruled the motion of defendant for a directed verdict, stating the case was a question of fact for the jury (Appellant's App. 15).

No witnesses were produced by defendant who saw the accident although the witness, Siff, corroborated the plaintiff to the effect that plaintiff was uninjured until he had gone to the stamping desk and then was injured (Appellee's App. 1).

The jury viewed the condition and were in a position to see exactly the question of fact involved (Appellant's App. 26, 27).

In the case of *Hellyer* v. *Sears, Roebuck & Co.*, 67 F. (2d) 584, the case wherein a patron was injured in a store, the Court in the course of its opinion said: "Appellant was an invitee, and, as such, appellee owed her the duty of exercising ordinary care to so construct the stairways to make them safe for a person using ordinary care for his own safety, and likewise owed the duty of inspecting them from time to time to keep them safe. If the metal covering the step nosing was either so constructed that it extended up above the surface of the tread in such a way as to make it dangerous to a person using the steps with due care, or if, after construction, it was allowed to get and remain in that condition, a case of actionable negligence would arise for an injury to an invitee."

In the cases of *Taylor* v. *Town of Monroe,* 43 Conn. 36, and *Lunny* v. *Pepe,* 165 A. 552, the Court held that the question as to whether or not a particular ramp was reasonably safe was a question of fact. When as in the case at bar the state of evidence is such where negligence is charged, that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury and the court should not direct a verdict.

Gunning v. *Cooley,* 50 S. Ct. 231, 281 U. S. 90.
Baltimore & P. R. Co. v. *Webster,* 6 App. D. C. 182.
Young Men's Shoppe v. *Odend'hal,* 121 F. (2d) 857.

From the foregoing it is clearly seen that the court was correct in denying the motions for a directed verdict.

The Court carefully considered the motion of defendant for judgment notwithstanding the verdict and it is not necessary to discuss the matter other than to refer to the Memorandum filed by the Court (Appellant's App. 33).

II.

The Court did not err in permitting the jury to view the premises and in taking testimony as to occurence of happening.

Testimony was introduced by plaintiff as to the condition existing and at the conclusion of the direct testimony of plaintiff the court counsel, reporter, plaintiff and representative of defendant went to the scene and made a view. A motion was made by counsel for plaintiff for the jury to view the condition and the Court took the motion under advisement. William H. Bozman, carpenter foreman for the defendant was called as a witness for defendant and, while the motion for the view was pending, brought to court and attempted to reconstruct the condition with wood, linoleum and brass trim taken from the store and viewed by the Court the preceding trial day (Appellee's App. 4).

The Court then felt it would be helpful and in the interest of justice for the jury to make a view of the scene (Appellant's App. 24) as the jury having seen a portion of it in court produced by the defendant they should see it where the happening occurred. While objection is made to testimony given at the scene, counsel for the defendant was the first to interrogate the witness at the scene (Appellant's App. 26) and insisted upon asking questions and it was then that the plaintiff was permitted to describe as to how the accident happened (Appellant's App. 27) (Appellee's App. 5, 6).

The question as to the propriety of the jury viewing the place where the accident happened is disposed of by testimony of the witness, Bozman (Appellant's App. 26-27) to

the effect that the condition was unchanged. The jury viewing the place of the happening was the logical and sensible action and enabled the jury to get first hand information instead of the verbal descriptions by witnesses.

In an action for injuries resulting from a defective highway, by which plaintiff was thrown from a wagon in which he was riding, it is within the discretion of the trial court whether an order shall be made permitting the jury to inspect the wagon seat upon which plaintiff was seated at the time of the accident. *Groundwater* v. *Washington,* 92 Wis. 56, 65 N. W. 871.

In *Owens* v. *Missouri P. R. Co.,* 38 Fed. 571, it was held not error to permit the jury to go outside the court room to examine the construction of an engine similar to the one that ran over or against the plaintiff, where the issue the jury had to decide was whether the plaintiff was struck by an engine, and how it came into contact with his body or limbs, and whether he was walking or lying down when he was struck.

In an action at law to recover damages arising from the maintenance of a continuous nuisance affecting premises occupied by the plaintiff as a home, there is no error or abuse of discretion in allowing the jury, over the plaintiff's objection, personally to inspect the premises and the factory involved in controversy. *Jones* v. *F. S. Royster Guano Co.,* 6 Ga. App. 506, 65 S. E. 361.

In the following cases the courts held that when the question involved is a physical fact, that it is proper to permit the jury to view the same and to show how the occurrence happened.

Stockwell v. *Chicago, C. & D. R. Co.,* 43 Iowa, 470.
Olsen v. *North Pacific Lumber Co.,* 106 Fed. 298.
Basham v. *Owensboro City R. Co.,* 169 Ky. 155, 183 S. W. 492.
Dobbins v. *Little Rock R. & Electric Co.,* 79 Ark. 85, 95 S. W. 794, 9 Ann. Cas. 84.
William H. Tarr v. *Keller Lumber & Construction Co.,* 144 S. E. 881; 60 A. L. R. 570.

CASES CITED BY APPELLANT.

It has never been contended by the Appellee that it is negligence for a store to have a ramp. The contention is as held in the cases cited by the appellee that it is a question of fact in each individual case as to what is the condition created and therefore the cases cited by appellant are inapplicable. With reference to the cases by appellant as to the right of the jury to view the scene, as in this case, a discussion of the law has already been given herein and the cases cited by appellant are not analyzes to the case at bar.

CONCLUSION.

No error was committed by the trial judge and there has been no showing that the verdict and judgment were not supported by the evidence. The issues involved in this case were fairly submitted to the jury under proper instructions from the court and the verdict and judgment on disputed questions of fact are amply supported by the evidence and the judgment of the District Court should be affirmed.

Respectfully submitted,

RALPH A. CUSICK,
1100 Investment Building,
Washington, D. C.,
Attorney for Appellee.

APPENDIX

INDEX TO APPENDIX.

Testimony of Witnesses.

APPENDIX

* * * * * * * * * *

Herman Siff

* * * * * * * * * *

Cross Examination

By Mr. Cusick:

151 Q. And he went up to the stand to get his parking ticket and have it wrapped, is that right, or what?
152 A. No. Just to have his parking ticket stamped.

Q. Did Mr. Harrison buy the first suit that he tried on, or did he try on several? A. He tried on several.

Q. And he walked to a mirror to see how he looked? A. Yes.

Q. At that time he walked perfectly all right? A. Perfectly all right.

Q. There was nothing wrong with him? A. There was nothing wrong with him.

Q. Right after the purchase was made and after he got his parking ticket, then he was injured in some way, was he? A. He was.

Q. There was no question about that? A. No question in my mind. No, sir.

Q. Did he appear to be in pain at the time? A. Yes, sir.

* * * * * * * * * *

William H. Bozman

* * * * * * * * * *

Cross Examination

By Mr. Cusick:

169 Q. Did you build the elevation there? A. Yes, sir.
Q. Do you recall when you built it? A. Well, I

would say about, I would say offhand, about four years ago. Three or four years ago.

Q. Three or four years ago? A. That is right. I will take that estimate.

Q. You have worked for the Hecht Company for sixteen years? A. Sixteen years.

Q. Prior to the time that you did this remodeling had you done any other work around there, just around that place here, that vicinity? A. Yes. We had done some other work around that place there. We had lowered the platform, cut it off, and laid a floor over an old floor which was in there. Then he come to us to put this ramp or to remove this offset here due to the fact that that floor was laid over another.

Q. The original floor that was here at the bottom—this was a rather old floor; had been there for quite some
170 time? A. That is right.

Q. And the flooring that you laid over the top of this old floor—is this a part of it here? A. That is right.

Q. What lumber was used for that? A. Pine.

Q. And the other floor was what? A. The other flooring? Well, I would say that was oak.

Q. Directing your attention to this photograph, Plaintiff's 1, where this railing here—

Mr. Simon: Railing? Do you mean stripping?

Mr. Cusick: Stripping.

The Witness: Brass nosing.

Mr. Cusick: Will you step over here a minute?

By Mr. Cusick:

Q. You see, there is one level over here? A. Yes.

Q. What is the distance from here to this level? A. 22 inches.

Q. 22 inches. A. Yes.

Q. What is the distance from the top of this level here to this level? A. Seven-eighths of an inch.

Q. You mean that is a drop of seven-eighths? A. That is right.

Q. And the drop from this level here down to here, that is how much? A. From this level of this nosing three-sixteenths of an inch at this point.

Q. What is it to the floor? A. That is what it is to the floor.

Q. Three-sixteenths from the floor to here? A. To this corner here, that nosing.

Q. What is the distance from this floor to this level here? A. Seven-eighths.

Q. There is one drop here? A. That is right.

Q. And the distance from the floor—I don't want to confuse you—from this floor to the top of this above here? A. That is right.

172 Q. That is seven-eighths of an inch? Is that right? A. That is right.

Q. Now, this is not level from here to here, is it? There is a slope there? A. That is right. From here to here.

Q. What is the distance—I am talking about from here to this end of it. A. That is seven-eighths.

Q. And the distance to the floor is seven-eighths? A. Yes.

Q. Now, you notice this mark in here. What is this here? A. That is the flooring where it is buckled, where there is a shadow. That might be a shadow on it in the picture.

* * * * * * * * * *

By Mr. Cusick:

174 Q. The flooring is placed there over the old flooring? A. We had covered some of the old flooring over, naturally.

* * * * * * * * * *

Q. When this linoleum was off, you could see where one floor went on top of the other, can't you? A. Well, yes.

* * * * * * * * * *

Redirect Examination

By Mr. Simon:

Q. Assume this to be the floor (laying a piece of plywood before the witness). This the flooring here. How would that be put onto that floor? A. That would be cemented on.

The Court: Suppose you come to the bench, gentlemen.

(The following proceedings were had at the bench, out of hearing of the jury:)

The Court: Is this linoleum and brass nosing what we saw there?

Mr. Simon: Yes, sir.

The Court: I don't understand why you have removed this. I thought there was a motion pending for a view. Is there any more of this over there?

Mr. Simon: We have plenty of it. This is just a little strip.

The Court: Do you still want a view?

Mr. Cusick: Yes. I think it would be helpful.

The Court: I think it would. I don't see but what this is a good time to go over there now.

Does this man have a level so he can do this demonstration?

Mr. Simon: Yes.

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Mr. Simon: Is that level there level now?

Mr. Bozman: Yes, sir.

(Mr. Bozman proceeded to make the measurement requested.)

Mr. Bozman: Pull your end up a little so as to make it level.

The Court: That looks about right to me now.

Mr. Bozman: One and three-quarter inches to the floor.

Mr. Cusick: A little more than one and three-quarters?

Mr. Bozman: One and three-quarters full.

Mr. Simon: Mr. Bozman, please measure the space from the strip to the—

Mr. Bozman: An inch and a half.

Mr. Simon: From the floor to the top of the brass stripping.

Mr. Bozman: That is three-sixteenths. Do you want to look at it?

Mr. Simon: No. I don't want to look at it. You said three-sixteenths?

Mr. Bozman: Yes.

Mr. Harrison: Here is the part where I stepped on the drop, from here to here.

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181 The Court: At about what point, Mr. Harrison, did you trip?

Mr. Harrison: Do you want me to show you?

Mr. Simon: He can't do that, because there is some question about that. I have some other witnesses. He cannot change his testimony.

The Court: Is there anything else? Have the jury anything that they want to ask?

Mr. Simon: Of course, the jury only saw one piece here. I think the jury, that that should be explained to them, that it has been here since September of 1940.

How long has this been a carpenter shop, Mr. Bozman?

The Court: You can have him give that testimony in the courtroom.

Mr. Simon: Is Mr. Wolin here?

Mr. Marlow: No.

Mr. Simon: Is there anyone here who can tell us where the clothing department was at that date? Do you know, Mr. Marlow?

182 Mr. Marlow: Along in here (indicating).

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183 Mr. Simon: If your Honor please, if that is supposed to show that his shoe wobbled like that at that

particular spot, I object, because I expect to prove that he didn't fall at that step, but he started to fall back in this direction.

Mr. Marlow: Where the parking desk was.

The Court: That is, I understand that the brass rail went along the entire length of the aisle.

Mr. Simon: But no one can say that it was like that or different than that. His testimony on the picture is that he twisted his ankle somewhere up in this portion of it (indicating).

The Court: All right. If any of the jurors want to try to walk along here where Mr. Simon says and also where the plaintiff himself says that he fell, he may do so.

A Juror: (Mr. Butler): May I ask where this desk was?

Mr. Bozman: I would say it was right around where I am. The end of it started here, and comes over here. This is facing the building that I am walking along. It came on down and then turned back in here.

Customers would stand up at the desk, just the same as this is here. In other words, here is the front edge of the desk, right here. The girl wrapped packages in back where you are. The ledge is back here. The customer stands right out here.

184 Mr. Simon: Where was the stamping desk? Right up at this corner?

Mr. Bozman: Right about here. I would say the stamping desk was about here.

The Court: Very well. Has everybody seen all that they want to?

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Nathan Wolin

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Cross Examination

190 By Mr. Cusick:

Q. Who directed your attention to Mr. Harrison? A. Mr. Siff. He was a salesman on the floor.

Q. Mr. Harrison was sitting in a chair when you came to him? A. Yes. He was sitting in a chair.

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Vincent E. Covins

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Direct Examination

192 By Mr. Simon:

Q. Did you see Mr. Harrison? A. I saw Mr. Harrison after he had fallen and was in the other part of the building.

Q. Where was he? A. He was back in the men's clothing department.

Q. What was he doing? A. Sitting in a chair.

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Ernest Violett

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Direct Examination

196 By Mr. Simon:

Q. On the day of this occurrence who directed your attention to the fact that there had been a gentleman who claimed to have been hurt? A. I came in from lunch and Mr. Wolin, who was assistant buyer for the clothing department, had relieved me for my lunch hour. When I came in, I found this party sitting in a chair.

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Cross Examination

202 By Mr. Cusick:

Q. Did you have any conversation with Mr. Harrison that day? A. No, sir.

Q. Who pointed out to you where the accident occurred? A. Mr. Wolin said that the man had fell in front of the desk.

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